

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FUCHSIA SUN,

Plaintiff,

v.

RENOWN HOSPITAL REGIONAL
 MEDICAL CENTER PEDIATRIC ICU, *et.*
al.,

Defendants.

Case No. 3:21-CV-00428-MMD-CLB

**REPORT AND RECOMMENDATION OF
 U.S. MAGISTRATE JUDGE¹**

[ECF Nos. 1, 4]

Before the Court are Plaintiff Fuchsia Sun's ("Sun"), two applications to proceed *in forma pauperis* (ECF Nos. 1, 4), and her *pro se* complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Sun's *in forma pauperis* applications, (ECF Nos. 1, 4), be granted, and her complaint, (ECF No. 1-1), be dismissed, without prejudice.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 LSR 1-1.

2 “[T]he supporting affidavit [must] state the facts as to [the] affiant’s poverty with
3 some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely
5 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
6 335 U.S. 331, 339 (1948).

7 A review of the applications to proceed IFP reveal Sun cannot pay the filing fee;
8 therefore, the Court recommends that the applications, (ECF Nos. 1, 4), be granted.

9 **II. SCREENING STANDARD**

10 Prior to ordering service on any defendant, the court is required to screen an *in*
11 *forma pauperis* complaint to determine whether dismissal is appropriate under certain
12 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
13 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
14 the enumerated reasons). Such screening is required before a litigation proceeding *in*
15 *forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507
16 (9th Cir. 2015).

17 “[T]he court shall dismiss the case at any time if the court determines that – (A) the
18 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious;
19 (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief
20 against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-
21 (iii).

22 Dismissal of a complaint for failure to state a claim upon which relief may be
23 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §
24 1915(e)(2)(B)(ii) tracks that language. When reviewing the adequacy of a complaint under
25 this statute, the court applies the same standard as is applied under Rule 12(b)(6). See,
26 e.g., *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for
27 determining whether a plaintiff has failed to state a claim upon which relief can be granted
28 under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)

1 standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling
2 on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir.
3 2000) (citation omitted).

4 The court must accept as true the allegations, construe the pleadings in the light
5 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*
6 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints
7 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes*
8 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

9 A complaint must contain more than a “formulaic recitation of the elements of a
10 cause of actions,” it must contain factual allegations sufficient to “raise a right to relief
11 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
12 “The pleading must contain something more. . . than. . . a statement of facts that merely
13 creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation
14 marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to
15 relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678
16 (2009).

17 A dismissal should not be without leave to amend unless it is clear from the face
18 of the complaint the action is frivolous and could not be amended to state a federal claim,
19 or the district court lacks subject matter jurisdiction over the action. *See Cato v. United*
20 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th
21 Cir. 1990).

22 **III. SCREENING OF COMPLAINT**

23 In her complaint, Sun sues Defendants Renown Regional Medical Center Pediatric
24 ICU (“Renown”), and various Renown doctors and staff for “medical malpractice
25 negligence.” (See ECF No. 1-1 at 2-4.) Sun alleges that on September 24, 2020,
26 defendants at Renown (1) performed an unnecessary colonoscopy leading to severe
27 complications for life; (2) performed multiple medical procedures without written or any
28 other consent leading to additional serious complications; and (3) failed to properly care

1 for a high-risk person leading to respiratory stress. (*Id.* at 4.) Sun states she is seeking
 2 five million dollars for “medical malpractice negligence caused by the medical stuff at
 3 Renown....” (*Id.*)

4 **A. A Pro Se Party Cannot Represent Other Parties**

5 As a preliminary matter, it is unclear to the Court if Sun *herself* was the party
 6 impacted by the alleged medical malpractice or if she is filing this lawsuit on behalf of an
 7 unnamed third-party. To the extent it is the latter, generally, *pro se* parties may not pursue
 8 claims on behalf of others in a representative capacity. *See, e.g., Simon v. Hartford Life,*
 9 *Inc.*, 546 F.3d 661, 665 (9th Cir. 2008) (collecting cases); *Russell v. United States*, 308
 10 F.2d 78, 79 (9th Cir. 1962) (“A litigant appearing *in propria persona* has no authority to
 11 represent anyone other than himself.”). Only a licensed attorney—an active member of
 12 the State Bar of Nevada admitted to practice under the Nevada Supreme Court Rules
 13 (“SCR”)—is duly authorized to represent a client in Nevada. *Guerin v. Guerin*, 993 P.2d
 14 1256, 1258 (Nev. 2000) (citing NRS 7.285). Although an individual is entitled to represent
 15 himself in the district court, no rule or statute permits a non-attorney to represent any
 16 other person, a company, a trust, or any other entity in Nevada courts. *Salman v. Newell*,
 17 885 P.2d 607, 608 (Nev. 1994) (citing SCR 44). Therefore, an individual “has no right to
 18 be represented by an agent other than counsel in a court of law.” *Martinez v. Eighth Jud.*
 19 *Dist. Ct.*, 729 P.2d 487, 488 (citing SCR 77; NRS 7.285).

20 **B. Court Lacks Subject Matter Jurisdiction Over Purely State Law Claims**

21 Notwithstanding the above, the Court finds that it lacks subject matter jurisdiction
 22 over this case, as the only claim alleged in the Complaint is one for state law medical
 23 malpractice.

24 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v.*
 25 *Kroger*, 437 U.S. 365, 374 (1978). Generally, for the court to have original federal subject
 26 matter jurisdiction, a case must either involve diversity of citizenship between the parties
 27 or involve a claim arising under federal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386,
 28 392 (1987) (“Absent diversity of citizenship, federal-question jurisdiction is required.”)

1 Alternatively, the Court may exercise supplemental jurisdiction in certain cases. See 28
2 U.S.C. § 1367.

3 For the Court to have federal question jurisdiction, the complaint must arise under
4 federal law. 28 U.S.C. § 1331. Generally speaking, “[a] cause of action arises under
5 federal law only when the plaintiff’s well-pleaded complaint raises issues of federal law.”
6 *Hansen v. Blue Cross of Cal.*, 891 F.2d 1384, 1386 (9th Cir. 1989). Here, Sun’s claim for
7 medical malpractice negligence sounds in state law. See *Pacheco v. Soon Kim*, No. 3:14-
8 cv-00124-MMD-VPC, 2014 WL 5460869 at *3 (D. Nev. Oct. 27, 2014) (Medical
9 malpractice is a state-law claim.) Accordingly, because there is no “issue of federal law”
10 raised by Sun’s claim for relief, there can be no federal question jurisdiction over this
11 claim. *Id.*

12 As for diversity jurisdiction, under 28 U.S.C. § 1332(a)(1), federal courts have
13 diversity jurisdiction over civil actions “where the matter in controversy exceeds the sum
14 or value of \$75,000 ... and is between ... citizens of different States.” 28 U.S.C. § 1332.
15 Furthermore, the diversity jurisdiction statute “applies only to cases in which the
16 citizenship of each plaintiff is diverse from the citizenship of each defendant.” *Caterpillar*
17 *Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Here, the Court lacks diversity jurisdiction because
18 both Sun and Defendants are citizens of Nevada and thus there is no diversity of
19 citizenship. (ECF No. 1-1.)

20 Finally, the Court also finds that it lacks supplemental jurisdiction over Sun’s state
21 law claim. Courts have supplemental jurisdiction “over all other claims that are so related
22 to claims in the action within such original jurisdiction that they form part of the same case
23 or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(b).
24 However, as discussed above, the Court lacks original jurisdiction over Sun’s state law
25 claim. Because supplemental jurisdiction requires that the Court have original jurisdiction
26 over at least one *other* claim, the Court may not exercise supplemental jurisdiction over
27 Sun’s sole state law medical malpractice claim.

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1 In sum, the Court lacks subject matter jurisdiction over Sun's claim and therefore
2 the complaint should be dismissed for lack of subject matter jurisdiction.

3 **C. Medical Malpractice Claim Must Be Dismissed Per NRS § 41A.071**

4 Here, even assuming the Court had subject matter jurisdiction over the state law
5 medical malpractice claim, Sun filed her claim without the supporting medical expert
6 affidavit required as required under Nevada law. (See ECF No. 1-1.) In medical
7 malpractice (professional negligence) claims, NRS 41A.071 requires that:

8 [T]he district court *shall* dismiss the action, without prejudice, if the action is
9 filed without an affidavit that: (1) Supports the allegations contained in the
10 action; (2) Is submitted by a medical expert who practices or has practiced
11 in an area that is substantially similar to the type of practice engaged in at
12 the time of the alleged professional negligence; (3) Identifies by name, or
13 describes by conduct, each provider of health care who is alleged to be
negligent; and (4) Sets forth factually a specific act or acts of alleged
negligence separately as to each defendant in simple, concise and direct
terms.

14 NRS 41A.071 (emphasis added). An action filed without a supporting medical expert
15 affidavit is "void *ab initio*, meaning it is of no force and effect." *Washoe Med. Ctr. v. Second*
16 *Judicial Dist. Court*, 122 Nev. 1298, 148 P.3d 790, 794 (Nev. 2006). The complaint must
17 be dismissed, without leave to amend. *Id.* ("[b]ecause a complaint that does not comply
18 with NRS 41A.071 is void *ab initio*, it does not legally exist and thus it cannot be
19 amended"). Ninth Circuit precedent confirms that NRS 41A.071 applies in federal cases
20 and requires dismissal of complaints that fail to include the required affidavit. *See Swails*
21 *v. United States*, 406 Fed. Appx. 124, 125–26 (9th Cir. 2010) (affirming this Court's
22 dismissal of the plaintiff's medical malpractice case for failure to include the required
23 affidavit pursuant to Nevada Revised Statute 41A.071). Accordingly, the Court finds that
24 Sun's claim for medical malpractice is void and therefore must be dismissed by operation
25 of law.

26 For all the above reasons, the Court recommends that Sun's complaint be
27 dismissed, without leave to amend.

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1 **IV. CONCLUSION**

2 For good cause appearing and for the reasons stated above, the Court
3 recommends that Sun's applications to proceed *in forma pauperis*, (ECF Nos. 1, 4), be
4 granted, and her complaint, (ECF No. 1-1), be dismissed, without leave to amend.

5 The parties are advised:

6 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
7 Practice, the parties may file specific written objections to this Report and
8 Recommendation within fourteen days of receipt. These objections should be entitled
9 "Objections to Magistrate Judge's Report and Recommendation" and should be
10 accompanied by points and authorities for consideration by the District Court.

11 2. This Report and Recommendation is not an appealable order and any
12 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
13 District Court's judgment.

14 **V. RECOMMENDATION**

15 **IT IS THEREFORE RECOMMENDED** that Sun's applications to proceed *in forma*
16 *pauperis*, (ECF Nos. 1, 4), be **GRANTED**;

17 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-
18 1);

19 **IT IS FURTHER RECOMMENDED** that Sun's complaint, (ECF No. 1-1), be
20 **DISMISSED, WITHOUT LEAVE TO AMEND**; and,

21 **IT IS FURTHER RECOMMENDED** that this action be **CLOSED**, and that judgment
22 be entered accordingly.

23 **DATED:** October 20, 2021.

24 
25 **UNITED STATES MAGISTRATE JUDGE**
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